

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MAILED

OCT 11 2006

FCC Mail Room

In the Matter of )  
 )  
Petition of Mid-Rivers Telephone Cooperative, Inc. ) WC Docket No. 02-78  
for Order Declaring It to be an Incumbent Local )  
Exchange Carrier in Terry, Montana Pursuant to )  
Section 251(h)(2) )

**REPORT AND ORDER****Adopted:** August 31, 2006**Released:** October 11, 2006

By the Commission:

**I. INTRODUCTION**

1. In this Order, we conclude that Mid-Rivers Telephone Cooperative, Inc. (Mid-Rivers) should be treated as an incumbent local exchange carrier (LEC) for purposes of section 251 of the Communications Act, as amended, in the Terry, Montana local exchange (Terry exchange) pursuant to section 251(h)(2) of the Act.<sup>1</sup> We also conclude that Mid-Rivers' operations in the Terry exchange should remain subject to existing competitive LEC regulation for interstate purposes pending further Commission action. In addition, we conclude that Qwest, the legacy incumbent LEC in the Terry exchange, should be subject to non-dominant regulation for its interstate telecommunications services in that exchange pending further action.<sup>2</sup>

**II. BACKGROUND****A. Mid-Rivers' Operations in the Terry Exchange**

2. In 1997, Mid-Rivers entered the Terry, Montana exchange as a competitive LEC and overbuilt the existing Qwest facilities.<sup>3</sup> Mid-Rivers estimates that it serves approximately 93 percent of

<sup>1</sup> 47 U.S.C. § 251(h)(2).

<sup>2</sup> A formal petition for forbearance applicable to Qwest's Terry operations consistent with the relevant Commission rules is not presently before the Commission. *See infra* note 71. If Qwest wishes to obtain additional regulatory relief in the Terry exchange, for example, removal of the unbundling requirements contained in sections 251 and 271 of the Act, it must file a forbearance petition consistent with the Commission's rules. As discussed below, Qwest may continue to operate under dominant carrier regulation in the Terry exchange if it wishes to do so for reasons of administrative convenience.

<sup>3</sup> Petition for Order Declaring Mid-Rivers Telephone Cooperative, Inc. an Incumbent Local Exchange Carrier in Terry, MT, at 1-2 (filed Feb. 5, 2002) (Mid-Rivers Petition). Mid-Rivers also provides competitive LEC service in Fairview, Glendive, Miles City, Sidney, and Wiebaux, Montana, and serves approximately 11,000 access lines in (continued....)

the access lines in the entire Terry exchange and 97 percent of the 317 residential and 118 business access lines within the Terry town limits.<sup>4</sup> Mid-Rivers serves its subscribers within the town limits of Terry entirely over its own facilities, which are directly interconnected with Qwest to allow the few remaining Qwest subscribers to communicate with Mid-Rivers' subscribers in the Terry exchange.<sup>5</sup> Mid-Rivers resells Qwest local exchange service in order to provide service to certain customers outside the Terry town limits.<sup>6</sup> Further, Mid-Rivers states that it intends to complete the overbuild of the Terry exchange upon the Commission's grant of its petition.<sup>7</sup>

3. In addition to offering basic local exchange service, Mid-Rivers also offers advanced services, including DSL, interactive TV (ITV) to the local school, and custom local area signaling services (CLASS).<sup>8</sup> Mid-Rivers has also taken steps to ensure the ready availability of maintenance and repair services for its Terry customers.<sup>9</sup> The Montana Public Service Commission (Montana Commission) designated Mid-Rivers as an eligible telecommunications carrier (ETC) in the Terry exchange in 2001.<sup>10</sup>

## **B. Notice of Proposed Rulemaking**

4. On February 5, 2002, Mid-Rivers filed a petition with the Commission, pursuant to section 251(h)(2) of the Act, seeking treatment as an incumbent LEC in the Terry exchange, and the Commission sought comment on the Petition.<sup>11</sup> The Commission subsequently adopted a Notice of Proposed Rulemaking (*Notice*) seeking comment on the application of section 251(h)(2) to Mid-Rivers' operations in the Terry exchange, as well as related issues concerning the appropriate regulatory

(Continued from previous page)

eastern Montana as an incumbent LEC. *Id.* at 1, 2 n.1. Since filing its petition, Mid-Rivers has completed overbuilding in the Terry exchange and can provide service to any customer over its own facilities. *See* Letter from David Cosson, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-78 (dated July 25, 2006) (Mid-Rivers July 25, 2006 *Ex Parte* Letter).

<sup>4</sup> Mid-Rivers Petition at 2 & n.2.

<sup>5</sup> *Id.* at 2. Mid-Rivers does not rely on any Qwest unbundled network elements (UNEs) or resold services in the town limits of Terry. *Id.*

<sup>6</sup> *Id.* at 2.

<sup>7</sup> Mid-Rivers Reply at 4.

<sup>8</sup> Mid-Rivers Petition at 3. CLASS provides for call-forwarding and caller identification. *See* Newton's Telecom Dictionary 170 (15th ed. 1999).

<sup>9</sup> Montana Commission Comments at 3-4.

<sup>10</sup> *Id.* at 2; *see also* 47 U.S.C. § 214(e) (defining the scope of ETC status). An eligible telecommunications carrier is a common carrier that offers all services that are supported by federal universal service support mechanisms under section 254(c) and that uses "media of general distribution" to advertise the availability of those services and its charges for them. 47 U.S.C. § 214(e)(1).

<sup>11</sup> *Pleading Cycle Established for Comments on Mid-Rivers Telephone Cooperative Inc. Petition for Declaratory Ruling to Declare Mid-River [sic] an Incumbent LEC Pursuant to Section 251(h)(2) of the Act*, Public Notice (dated Apr. 19, 2002) (Public Notice). The parties filing in response to the April Public Notice on the Mid-Rivers Petition are listed in Appendix A.

treatment of Mid-Rivers' and Qwest's operations in the Terry exchange.<sup>12</sup> Mid-Rivers has stated that it will file a request for waiver of the Commission's study area boundary freeze<sup>13</sup> if the Commission accords it incumbent LEC status pursuant to section 251(h)(2).<sup>14</sup>

### C. Section 251(h)(2) and Related Commission Decisions

5. Section 251 of the Act establishes different pro-competitive requirements for telecommunications carriers,<sup>15</sup> LECs,<sup>16</sup> and incumbent LECs,<sup>17</sup> with the most rigorous requirements applying to incumbent LECs. In particular, an incumbent LEC is subject to the requirements of section 251(c) as well as the requirements of sections 251(a) and (b).<sup>18</sup>

6. Section 251(h)(1) defines an incumbent LEC as a local exchange carrier that, on the date of enactment of the Telecommunications Act of 1996, provided local exchange service in an area and was either a member of the National Exchange Carrier Association (NECA),<sup>19</sup> or became a successor or assign of such a LEC.<sup>20</sup> Section 251(h)(2) provides that the Commission may by rule provide for the

<sup>12</sup> *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, Notice of Proposed Rulemaking, WC Docket No 02-78, 19 FCC Rcd 23070 (2004) (*Notice*). The Commission initiated a rulemaking proceeding because section 251(h)(2) refers to Commission action "by rule" to treat a LEC as an incumbent LEC for purposes of section 251. The parties filing in response to the *Notice* are listed in Appendix B to this Order. On March 31, 2005, the United States Court of Appeals for the District of Columbia Circuit denied a Petition for a Writ of Mandamus filed by Mid-Rivers seeking to compel the Commission to act on its original Petition. See *Mid-Rivers Telephone Cooperative, Inc.*, No. 04-1163, slip op. (D.C. Cir. Mar. 31, 2005).

<sup>13</sup> See 47 C.F.R. Part 36 App. The Appendix to Part 36--Glossary provides that "[s]tudy area boundaries shall be frozen as they are on November 15, 1984." This provision requires that incumbent LECs obtain a waiver from the Commission before they incorporate additional service territory into their existing study area or transfer service territory to another incumbent LEC. *Id.*

<sup>14</sup> See Mid-Rivers Petition at 3.

<sup>15</sup> See 47 U.S.C. § 251(a).

<sup>16</sup> See 47 U.S.C. § 251(b).

<sup>17</sup> See 47 U.S.C. § 251(c).

<sup>18</sup> Section 251(c) obligations of an incumbent LEC include the duty to negotiate interconnection agreements in good faith; to provide specified interconnection to requesting telecommunications carriers; to provide requesting telecommunications carriers with unbundled access to its network elements; to offer for resale at wholesale rates certain telecommunications services; and to provide physical collocation of certain equipment belonging to other telecommunications carriers. 47 U.S.C. §§ 251(c)(1), (2), (3) & (4).

<sup>19</sup> NECA is an association, established by Commission rule, for all "telephone companies that participate in the distribution of Carrier Common Line revenue requirement, pay long term support to association Common Line tariff participants, or receive payments from the transitional support fund administered by the association." 47 C.F.R. § 69.601(b). The association was established "in order to prepare and file access tariffs on behalf of all telephone companies that do not file separate tariffs or concur in a joint access tariff of another company for all access elements." 47 C.F.R. § 69.601(a).

<sup>20</sup> 47 U.S.C. § 251(h)(1).

treatment of a LEC as an incumbent LEC for the purposes of section 251 if certain requirements are satisfied.<sup>21</sup> Section 251(h)(2) sets forth a three-part test for determining when the Commission may treat a LEC as an incumbent LEC for purposes of section 251. Under this test, in order to find that a LEC should be treated as an incumbent LEC for purposes of section 251, the Commission must find that: (1) the LEC at issue occupies a market position comparable to a legacy incumbent LEC; (2) the LEC has “substantially replaced” the legacy incumbent LEC; and (3) the reclassification serves the public interest, convenience, and necessity and the purposes of section 251.<sup>22</sup>

7. In the Commission’s only prior section 251(h)(2) proceeding, it found that the Guam Telephone Authority (GTA) satisfied the section 251(h)(2) three-part test and should be treated as an incumbent LEC for purposes of section 251.<sup>23</sup> The circumstances of that proceeding were unusual since GTA was the sole provider of local exchange service in Guam. The Commission addressed GTA’s status under section 251(h)(2) only after concluding that GTA did not qualify as an incumbent LEC under section 251(h)(1) because it had not been a NECA member on February 8, 1996, as required by that provision, and was not the successor or assign of such an incumbent LEC.<sup>24</sup>

### III. DISCUSSION

#### A. Section 251(h)(2) – Treatment as an Incumbent LEC for Purposes of Section 251

8. We conclude that Mid-Rivers satisfies the three-part test in section 251(h)(2) and should be treated as an incumbent LEC for purposes of section 251. Specifically, we find that the Terry exchange is the appropriate area for consideration under section 251(h)(2)(A), and that Mid-Rivers occupies a market position comparable to that of a traditional legacy incumbent LEC in the Terry exchange. We also find that Mid-Rivers has “substantially replaced” Qwest in the Terry exchange, and that treating Mid-Rivers as an incumbent LEC for purposes of section 251 in the Terry exchange is consistent with the public interest. We expect that the treatment of Mid-Rivers as an incumbent for purposes of access charges, universal service support and other purposes will be addressed, as appropriate, in conjunction with the study area boundary waiver request that Mid-Rivers has stated it plans to file.<sup>25</sup>

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<sup>21</sup> 47 U.S.C. § 251(h)(2); *see also* section 51.223 of the Commission’s rules, 47 C.F.R. § 51.223, which implements section 251(h)(2).

<sup>22</sup> 47 U.S.C. § 251(h)(2). *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16110, para. 1248 (1996) (a “clear and convincing” showing should be required to satisfy the requirements of section 251(h)(2)).

<sup>23</sup> *Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Section 3(37) and 251(h) of the Communications Act; Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act (Guam Proceeding)*, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd 6925, 6926, para. 1 (1997) (*Guam Declaratory Ruling and NPRM*); *Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, Report and Order, 13 FCC Rcd 13765 (1998) (*Guam Order*).

<sup>24</sup> *Guam Declaratory Ruling and NPRM*, 12 FCC Rcd at 6927, paras. 2-3; *Guam Order*, 13 FCC Rcd 13765.

<sup>25</sup> In this Order, we do not address the treatment of Mid-Rivers as an incumbent LEC for purposes other than section 251. *See infra* para. 17.

# **1. Section 251(h)(2)(A) – Comparable Market Position Within an Area**

9. The first part of the section 251(h)(2) test for treatment of a LEC as an incumbent LEC for purposes of section 251 requires that “such carrier occup[y] a position in the market for telephone exchange service within an area that is comparable to the position occupied by [a legacy incumbent LEC].”<sup>26</sup> In the *Notice*, the Commission sought comment on the proper area for consideration under this provision, and tentatively concluded that Mid-Rivers occupied a market position similar to that of a legacy incumbent LEC assuming that the Terry exchange was the appropriate area for analysis.<sup>27</sup> As discussed more fully below, we find that the Terry exchange is the relevant area for analyzing Mid-Rivers’ market position, and that Mid-Rivers occupies a position in the market for telephone exchange service within the Terry exchange comparable to that of a legacy incumbent LEC.

10. A local exchange is a traditional and clearly defined geographic unit for the provision of local exchange service. While the Terry exchange encompasses a relatively limited area, including the town of Terry and the surrounding rural area, we believe that it is an appropriate area for consideration in light of the actual language as well as the purposes of section 251(h)(2). In particular, section 251(h)(2) uses the phrase “within an area” instead of referring to a service territory.<sup>28</sup> The use of this broad, general language gives the Commission ample flexibility to interpret the term “area” as encompassing a single local exchange in the present circumstances given the purposes of the Act. Moreover, in order to meet the requirements that the new LEC have a market position comparable to a legacy incumbent LEC’s and have substantially replaced the legacy incumbent LEC, the new LEC will likely have to overbuild a large portion of the legacy incumbent LEC’s facilities. Given the expense of such facility construction, replacement of a legacy incumbent LEC consistent with the requirements of section 251(h)(2) is most likely to occur in limited geographic areas such as individual local exchanges or small groups of exchanges, particularly in rural areas. In fact, this pattern has occurred in a number of rural areas where a small incumbent local exchange carrier has entered a neighboring exchange or group of exchanges as a competitive LEC and overbuilt existing facilities.<sup>29</sup>

11. In light of our analysis, we conclude that it is reasonable to treat the Terry exchange as the proper area for consideration despite the fact that the Commission frequently considers larger geographic areas in other types of regulatory analyses. Mandating consideration of a substantially larger area when determining whether a LEC has a market position comparable to a legacy incumbent LEC would exclude from consideration exactly the type of limited area in which “replacement” of a legacy incumbent LEC, consistent with the requirements of section 251(h)(2), is most likely to occur. Interpreting the statute to require consideration of a substantially larger area for this purpose could render the statutory provision a nullity if carriers do not overbuild existing local networks throughout larger areas. Neither the actual language of section 251(h)(2) nor the goals of the Act support such a

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<sup>26</sup> 47 U.S.C. § 251(h)(2)(A).

<sup>27</sup> See *Notice*, 19 FCC Rcd at 23073-74, paras. 6-8.

<sup>28</sup> See 47 U.S.C. § 251(h)(2)(A).

<sup>29</sup> See, e.g., Letter from Craig Brown, Senior Attorney, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-78, at 3 (dated June 28, 2002) (stating that Qwest is aware of at least 20 areas where a rural incumbent LEC has overbuilt Qwest’s local telephone network); Qwest Comments at 8 (stating that in Montana alone, Mid-Rivers and other rural incumbent LECs have overbuilt in three communities served by Qwest and that additional build-out is underway).

result. Accordingly, consistent with the record in this proceeding and the statutory analysis above, we conclude that the Terry exchange is the appropriate area for consideration in determining whether Mid-Rivers occupies a market position comparable to a legacy incumbent LEC.<sup>30</sup>

12. We also affirm our tentative conclusion that Mid-Rivers occupies a position in the market for local exchange service<sup>31</sup> comparable to that of a legacy incumbent LEC<sup>32</sup> since it serves between 85 and 93 percent of the access lines in the Terry exchange,<sup>33</sup> in most cases over its own facilities.<sup>34</sup> While, this market share range is somewhat lower than the shares many traditional legacy incumbent LECs held prior to passage of the 1996 Telecommunications Act, it is significantly higher than the shares held by many legacy incumbent LECs in recent years.<sup>35</sup> In reaching the conclusion that Mid-Rivers occupies a market position comparable to a legacy incumbent LEC, we recognize that Mid-Rivers' position is not identical to that of a typical legacy incumbent LEC in certain respects. In particular, Qwest continues to

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<sup>30</sup> See, e.g., AT&T Comments at 3 n.5 (stating that an area could consist of a single exchange because that is consistent with the pro-competitive intent of the Act); Montana Commission Comments at 2 (arguing that the Terry exchange should be the relevant area for this petition); NTCA Comments at 2 (noting that the Commission could find that the local exchange is the proper area for performing a section 251(h) analysis); RICA Comments at 3 (believing that nothing smaller than an exchange would be appropriate for defining an area); South Slope Reply at 2 (finding it logical that the Commission would find an exchange to meet the definition of area); Staurulakis Comments at 3 (stating that the relevant area should be the service area used by the incumbent).

<sup>31</sup> Given the very limited number of access lines in the Terry exchange and the absence of any large business customers, there is no need to analyze the mass market and business markets separately as the Commission frequently does in other contexts. See Letter from David Cosson, Counsel to Mid-Rivers Telephone Cooperative, Inc., Kraskin, Moorman & Cosson, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-78, at 2 (dated Sept. 7, 2006) (stating that there are no substantial business lines in Terry and that only one customer has 8 lines, and all the rest have 1 or 2). We do not address the question of what type of local exchange market analysis would be appropriate for purposes of section 251(h)(2) in an area with substantially more business access lines or total access lines.

<sup>32</sup> See Notice, 19 FCC Rcd at 23074, para. 8; see also, e.g., NTCA Comments at 3 (arguing that Mid-Rivers occupies a comparable position to Qwest in the Terry exchange); TCA Comments at 3 (same).

<sup>33</sup> The record in this proceeding contains a range of subscribership estimates for Mid-Rivers in the Terry exchange. In its initial Petition, Mid-Rivers estimates that it served 93 percent of the access lines in the Terry exchange and 97 percent of the access lines in the town of Terry. Mid-Rivers Petition at 2 & n.2. The Commission used these figures in its Notice of Proposed Rulemaking. Notice, 19 FCC Rcd at 23072, para. 4. In its comments, the Montana Commission refers to "Mid-Rivers' provision of service to over 85 percent of the customers in the area," and states that "Qwest now serves about fifteen percent of the customers, or about 75 customers total, in the Terry exchange." Montana Commission Comments at 2. In its Reply, the Montana Commission refers to the 93 percent and 97 percent subscribership estimates in Mid-Rivers' original Petition, but later describes Mid-Rivers as "achiev[ing] an 85% share of the market." Montana Commission Reply at 4, 10. Mid-Rivers does not address the Montana Commission estimates in its Reply. In any event, even the lowest estimates show a very high subscribership level such that we need not resolve the differences in the record.

<sup>34</sup> See Mid-Rivers July 25, 2006 *Ex Parte* Letter (updating the record to reflect that Mid-Rivers, since filing its Petition, has completed overbuilding the Terry exchange).

<sup>35</sup> See, e.g., *Local Telephone Competition: Status as of June 30, 2005* (WCB IATD Apr. 2006); *Local Telephone Competition: Status as of June 30, 2004* (WCB IATD Dec. 2004); *Local Telephone Competition at the New Millennium* (CCB IATD Aug. 2000).

own and operate facilities throughout the Terry exchange. The presence of these facilities undoubtedly reduces the strength of Mid-Rivers' market position to some extent. It appears, however, that the Qwest and Mid-Rivers facilities and operations differ in certain respects. The Mid-Rivers facilities in Terry appear to be technically superior to those of Qwest.<sup>36</sup> Mid-Rivers also appears to provide maintenance and repair operations that are located much closer to the Terry exchange than those provided by Qwest.<sup>37</sup> In light of this and the extraordinarily high subscribership level attained by Mid-Rivers in the Terry exchange, which testifies to the superiority of its service offerings, we conclude that the continued existence of Qwest's facilities in the Terry exchange does not preclude a determination that Mid-Rivers occupies a market position in the Terry exchange comparable to that of a legacy incumbent LEC.<sup>38</sup> In this regard, we note that the statutory language does not require that a new LEC occupy a market position that is identical to that of a legacy incumbent LEC.<sup>39</sup>

13. We believe our finding that Mid-Rivers occupies a market position comparable to that of a legacy incumbent LEC in the Terry exchange is fully consistent with the Congressional intent underlying this provision. As previously discussed, most situations in which a competitive LEC effectively replaces the legacy incumbent LEC, and thus may qualify for treatment as an incumbent LEC pursuant to section 251(h)(2), are likely to involve facility overbuilds. Unless the legacy incumbent LEC abandons its facilities or sells its operations in the exchange to the new LEC, such situations will result in the existence and operation of two sets of local exchange facilities in the same area. Concluding that the mere existence of two sets of local exchange facilities, regardless of other considerations such as subscribership levels, forecloses a finding that a LEC has obtained a market position comparable to that of a legacy incumbent LEC would prevent treatment of a LEC as an incumbent LEC under section 251(h)(2) in almost all cases. We do not believe that this is what Congress intended in enacting this provision, and thus conclude that Mid-Rivers occupies a market position comparable to a legacy incumbent LEC in the Terry exchange.

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<sup>36</sup> See Mid-Rivers Petition at 3; Montana Commission Comments at 3-4; Prairie County Comments at 1 (stating that Mid-Rivers has provided the town of Terry with advanced services that were not previously available).

<sup>37</sup> See, e.g., Montana Commission Comments at 3-4 (noting that Mid-Rivers employs an installer/repair technician who lives in Terry and a customer service representative who makes monthly visits to the Terry exchange, and Terry customers have 24/7 access to the Mid-Rivers Technical Assistance Center in Glendive, Montana). Mid-Rivers, additionally, asserts that the nearest Qwest customer service location to Terry is at least 200 miles away. See Mid-Rivers Petition at 1.

<sup>38</sup> See, e.g., Montana Commission Comments at 3-4 (arguing that Mid-Rivers' network in Terry is superior to Qwest's network).

<sup>39</sup> See 47 U.S.C. § 251(h)(2)(A) (stating that the Commission must find that a carrier occupies a "comparable" position to the incumbent LEC). The existence of a second set of facilities is closely related to the issue of whether Mid-Rivers has sufficient market power to raise rates. Above, we discuss why the presence of a second set of facilities does not prevent us from concluding that Mid-Rivers is in a market position comparable to that of an incumbent LEC. We believe that analysis also addresses whether Mid-Rivers has sufficient market power to be in a position comparable to an incumbent LEC. Accordingly, we disagree with commenters arguing that the Commission cannot conclude that Mid-Rivers is in a position comparable to an incumbent LEC on the grounds that it has not shown that it can increase rates. See, e.g., SBC Comments at 7 (arguing that Mid-Rivers is not in a comparable position to the incumbent LEC because Mid-Rivers cannot raise rates) (comments filed prior to merger with AT&T).

## 2. Section 251(h)(2)(B) – Substantially Replaced Legacy Incumbent LEC

14. The second part of the section 251(h)(2) test for when a LEC may be treated as an incumbent LEC for purposes of section 251 requires a finding that “such carrier has substantially replaced an incumbent LEC described in paragraph (1)” – in this case Qwest.<sup>40</sup> In the *Notice*, the Commission tentatively concluded that Mid-Rivers met this requirement because it serves approximately 93 percent of the access lines in the Terry exchange.<sup>41</sup> We affirm this tentative conclusion.<sup>42</sup>

15. In light of the fact that Mid-Rivers serves approximately 85 to 93 percent of the access lines in the Terry exchange largely over its own facilities, we conclude that Mid-Rivers has substantially replaced Qwest as the local exchange service provider in the Terry exchange.<sup>43</sup> This conclusion is consistent with the meaning of the phrase “substantially replace” in ordinary English usage.<sup>44</sup> We also believe that this conclusion is consistent with the Commission’s determination in the *Guam Proceeding* in which the Commission found that section 251(h)(2)(B) is satisfied when the LEC at issue provides local exchange service “to all or virtually all” of the subscribers in the service area.<sup>45</sup> While the circumstances present in that proceeding differ from those presently before us, the differences do not undermine our conclusion that Mid-Rivers has substantially replaced Qwest in the Terry exchange.<sup>46</sup>

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<sup>40</sup> 47 U.S.C. § 251(h)(2)(B).

<sup>41</sup> *Notice*, 19 FCC Rcd at 23074, para. 9.

<sup>42</sup> See, e.g., Mid-Rivers Reply at 4 (stating that no commenter has seriously challenged the idea that Mid-Rivers has substantially replaced Qwest in the Terry exchange and thus the Commission should adopt its tentative conclusion).

<sup>43</sup> See, e.g., Hancock Comments at 2 (arguing that Mid-Rivers has “substantially replaced” Qwest in the Terry exchange); NTCA Comments at 3-4 (same); RICA Comments at 2 (same); Staurulakis Comments at 4 (same); TCA Comments at 4 (same); AT&T Reply at 2 (same).

<sup>44</sup> “Substantial” is defined as “pertaining to the essence of a thing,” and “replace” is defined as “to assume the function of; substitute for.” Random House Webster’s College Dictionary 1117, 1303 (1999). In reaching this conclusion, we recognize that the Commission has interpreted the phrase, “replacement for a substantial portion of the local telephone exchange service” in the context of the Communications Assistance for Law Enforcement Act as requiring a lesser degree of replacement than exists in the Terry exchange. See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14994-95, paras. 12-13 (2005), *aff’d*, *American Council on Educ. v. FCC*, No. 05-1404 (D.C. Cir. June 9, 2006). We believe that these differences in interpretation are amply justified by the differences in the language at issue (“substantially replace” versus “substantial portion”), the differences in the purposes of the statutory provisions involved, and existing Commission precedent concerning the interpretation of section 251(h)(2).

<sup>45</sup> *Guam Declaratory Ruling and NPRM*, 12 FCC Rcd at 6947, para. 38; *Guam Order*, 13 FCC Rcd at 13768-69, para. 6 (adopting the conclusions from the *Guam Declaratory Ruling and NPRM*).

<sup>46</sup> The circumstances involving the GTA differ from the present circumstances since GTA did not technically replace another service provider on the island of Guam as it had always been the local exchange service provider there. Despite this, the Commission concluded that GTA should be found to have satisfied the “substantially replace” requirement of section 251(h)(2)(B) based on the fact that it served virtually all the subscribers in Guam and the policy objectives underlying section 251(h)(2). *Guam Declaratory Ruling and NPRM*, 12 FCC Rcd at 6942-47, paras. 28-39; *Guam Order*, 13 FCC Rcd at 13768-69, paras. 5-9.



Therefore, we adopt the tentative conclusion in the *Notice* and find that Mid-Rivers has “substantially replaced” Qwest in the Terry exchange.

### 3. Section 251(h)(2)(C) – Consistent with the Public Interest

16. The third and final part of the section 251(h)(2) test requires the Commission to find that treating the LEC as an incumbent LEC for purposes of section 251 “is consistent with the public interest, convenience, and necessity and the purposes of [section 251].”<sup>47</sup> We find that treating Mid-Rivers as an incumbent LEC in the Terry exchange for purposes of section 251 satisfies this requirement.<sup>48</sup>

17. At the outset, we note that the public interest analysis required by section 251(h)(2)(C) addresses matters related to the role of incumbency under section 251. The statute specifies that section 251(h)(2) permits the Commission to treat a LEC as an incumbent LEC “for purposes of this section,” *i.e.*, section 251. It does not address whether a LEC treated as an incumbent LEC for purposes of section 251 should also be treated as an incumbent LEC for purposes of other statutory provisions or Commission rules.<sup>49</sup>

18. We conclude that treating Mid-Rivers as an incumbent LEC for purposes of section 251 “is consistent with the public interest, convenience, and necessity and with the purposes of [section 251].”<sup>50</sup> As previously discussed, section 251 establishes pro-competitive requirements for telecommunications carriers, LECs, and incumbent LECs, with the most extensive requirements applicable to incumbent LECs. Incumbent LEC treatment of Mid-Rivers in the Terry exchange would make Mid-Rivers subject to the additional market opening requirements in section 251(c), absent the fact that it currently qualifies for the rural exemption in section 251(f)(1).<sup>51</sup> While treating Mid-Rivers as an incumbent LEC in the Terry exchange will not immediately subject Mid-Rivers to the additional market opening requirements of section 251(c) due to the rural exemption, it will move Mid-Rivers one step closer to the application of such requirements. Mid-Rivers would become subject to the section 251(c) requirements if it “received a bona fide request for interconnection, services, or network elements, and . . . the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with [certain provisions of] section 254 . . . .”<sup>52</sup> As a non-incumbent LEC, Mid-Rivers would be permanently exempt from the requirements of section 251(c).<sup>53</sup> Ensuring that

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<sup>47</sup> 47 U.S.C. § 251(h)(2)(C).

<sup>48</sup> *See, e.g.*, RICA Comments at 5 (arguing that grant of the petition is in the public interest); TCA Comments at 4 (same).

<sup>49</sup> We plan to address the universal service and access charge issues as part of a subsequent proceeding.

<sup>50</sup> 47 U.S.C. § 251(h)(2)(C).

<sup>51</sup> *See* 47 U.S.C. § 251(f). Mid-Rivers declined to speculate concerning its response to an actual section 251(c) interconnection request in the Terry exchange and noted that in the 8 years it has operated in Terry, no other competitive LEC has showed any interest in competing with it. Mid-Rivers Reply at 7. We note, however, that Western Wireless has been designated as an Eligible Telecommunications Carrier in the Terry exchange and qualifies for universal service support.

<sup>52</sup> 47 U.S.C. § 251(f)(1)(A).

<sup>53</sup> Section 251(c) applies only to incumbent LECs. *See* 47 U.S.C. § 251(c).

Mid-Rivers, as an incumbent LEC, would be subject to the requirements of section 251(c) under the conditions described above, rather than permanently exempt from section 251(c), is certainly consistent with the public interest and the purposes of section 251.

19. We disagree with the commenters that argue the Commission cannot find that Mid-Rivers satisfies the public interest requirement of section 251(h)(2)(C) if Mid-Rivers avails itself of the rural exemption.<sup>54</sup> Absent our decision to treat Mid-Rivers as an incumbent LEC for purposes of section 251, a new competitive LEC seeking to serve the Terry exchange would be permanently foreclosed from obtaining interconnection, unbundled network elements or other offerings mandated by section 251(c) from Mid-Rivers. Accordingly, for the reasons discussed above, we conclude that Mid-Rivers has satisfied this requirement despite the fact that it qualifies for the rural exemption in the Terry exchange. Nor do we believe that it would be appropriate for the Commission to condition incumbent LEC treatment for purposes of section 251 on Mid-Rivers' relinquishment of the rural exemption in that exchange. The statute does not require this, and mandating relinquishment of the rural exemption as a condition of incumbent LEC treatment for purposes of section 251 involves an intrusion into the role of the state commission in deciding when to terminate the rural exemption.<sup>55</sup> We do not believe that this is warranted or consistent with the statute in the present circumstances.<sup>56</sup>

## B. Subsequent Regulation

20. As discussed below, we also reduce the extent of regulation applicable to Qwest's interstate services in the Terry exchange.<sup>57</sup> In the *Notice*, the Commission sought comment on the appropriate regulatory treatment of Qwest if the Commission found Mid-Rivers to be an incumbent LEC under section 251(h)(2).<sup>58</sup> In light of the record in this proceeding, we conclude that Qwest should be treated as a non-dominant carrier in the Terry exchange for purposes of its interstate service offerings. Qwest may request additional deregulation in the Terry exchange by filing a formal petition for forbearance

<sup>54</sup> See, e.g., GCI Comments at 10-12; Qwest Comments at 9; GCI Reply at 5; Qwest Reply at 6; Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-78, at 4 (dated Aug. 24, 2006) (Qwest Aug. 24, 2006 *Ex Parte* Letter).

<sup>55</sup> See, e.g., Montana Commission Comments at 11 (arguing that Mid-Rivers should maintain its section 251(f) protections until the state commission terminates the exemption).

<sup>56</sup> We also note that arguments concerning the public interest effect of the rural exemption in the Terry exchange may well be largely theoretical in nature since an additional competitive provider of local exchange services is unlikely to enter a small rural exchange such as Terry that already has two service providers with their own local exchange facilities. See, e.g., Letter from David Cosson, Counsel to Mid-Rivers Telephone Cooperative, Inc., Kraskin, Moorman & Cosson, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-78, Att. at 9 (dated Sept. 24, 2004) (noting that no competitor has sought entry since Mid-Rivers filed its petition).

<sup>57</sup> We do not agree with commenter suggestions that we should defer addressing Qwest's regulatory classification in this proceeding. See, e.g., Montana Commission Comments at 9; Cox Reply at 3-6; Mid-Rivers Reply at 9; Montana Commission Reply at 4; South Slope Reply at 3. We believe that it is important to address Qwest's dominant carrier regulatory classification in the Terry exchange in light of Qwest's greatly diminished market position. See, e.g., SBC Comments at 3 (arguing that the Commission should remove dominant carrier regulation from a legacy incumbent LEC upon the classification of a competitive LEC as an incumbent LEC); Qwest Reply at 7 (arguing that treatment of Qwest is related to this proceeding).

<sup>58</sup> See *Notice*, 19 FCC Red at 23077-78, paras. 13-15.

consistent with the relevant Commission rules, although it has not yet done so.

21. In the *Notice*, the Commission asked for comment on a number of issues related to the future regulation of a legacy incumbent LEC in an exchange where a competitive LEC has been designated as an incumbent LEC for the purposes of section 251.<sup>59</sup> In particular, the Commission sought comment on whether the Commission must remove dominant carrier regulation from such a legacy incumbent LEC. The Commission also requested comment on whether such a legacy incumbent LEC should automatically be converted to competitive LEC status. In addition, the Commission sought comment on whether forbearance was the required means of addressing the status of such a legacy incumbent LEC, and the relationship between the findings required under section 251(h)(2) and the requirements for section 10 forbearance.<sup>60</sup> Many of the commenters addressed these issues, expressing a wide range of views. Some argued that the Commission should not address subsequent regulation at this time<sup>61</sup> while others argued that broad forbearance from section 251(c) requirements was warranted.<sup>62</sup>

22. Based on a review of the statutory language and the record in this proceeding, we conclude that the Act does not directly specify the proper framework for the regulatory treatment of the legacy section 251(h)(1) incumbent LEC when the Commission designates another LEC as an incumbent LEC for purposes of section 251 as provided in section 251(h)(2).<sup>63</sup> The definition of an incumbent LEC in section 251(h)(1) does not provide for removal or modification of incumbent LEC status in the event that another LEC has effectively replaced the original legacy incumbent LEC and now qualifies as an incumbent for purposes of section 251.<sup>64</sup> Thus, although the Commission must make a determination that a LEC occupies a position comparable to, and has substantially replaced, the incumbent LEC when deciding to treat a LEC as a section 251(h)(2) incumbent LEC, this does not appear to change the status of the legacy incumbent LEC automatically and convert the legacy section 251(h)(1) incumbent LEC into a competitive LEC.<sup>65</sup>

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<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See, e.g.,* GCI Comments at 14; Montana Commission Comments at 9; Mid-Rivers Reply at 9.

<sup>62</sup> Qwest Comments at 10-11 (under existing circumstances, the legacy incumbent LEC's unbundling obligations should be eliminated automatically); Qwest Reply at 5-6 (Qwest should not continue to have unbundling obligations in Terry); *see also* ACS Comments at 2-5 (carrier serving less than 50 percent of a market should not be regulated as dominant); SBC Comments at 6-7 (Commission should eliminate dominant carrier regulation in Terry).

<sup>63</sup> *But see* Qwest Aug. 24, 2006 *Ex Parte* Letter at 2-3 (arguing that if an incumbent LEC has been displaced then no entity should have section 251 or 271 obligations, or dominant carrier status in those areas or, in the alternative, if the Commission does not forbear from the section 251 obligations, then the Commission should find that only the section 251(h)(2) incumbent LEC is subject to section 251's interconnection, unbundling, and resale obligations from that point).

<sup>64</sup> *See id.* at 3 (arguing that section 251(h)(2) "implicitly" calls for the incumbent LEC designation to be removed from the legacy incumbent LEC after a Commission section 251(h)(2) finding).

<sup>65</sup> We note that this issue could arise in the context of a study area boundary waiver request by Mid-Rivers intended to permit inclusion of its operations in the Terry exchange in its Montana study area.

23. Instead, the Commission's rules and the Act provide mechanisms for the removal of unnecessary regulation.<sup>66</sup> For example, the Commission has standards for removing dominant carrier regulation when a carrier no longer has sufficient market power to warrant such regulation.<sup>67</sup> In addition, section 10 of the Act permits the Commission to remove statutory requirements when certain requirements are met.<sup>68</sup> Although there is overlap between the standards in section 251(h)(2) and section 10, there are also meaningful differences in the language of each provision.<sup>69</sup>

24. Although Qwest has included requests for forbearance from dominant carrier regulation as well as section 251 and 271 unbundling and resale obligations in its filings in this proceeding,<sup>70</sup> it has not filed a formal petition for forbearance consistent with the Commission rules.<sup>71</sup> In addition, the

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<sup>66</sup> See 47 U.S.C. § 160. Based on the statutory language, we cannot agree with commenters who argue that if the elements of section 251(h)(2) are satisfied, the requirements of section 10 have also been met for purposes of relieving the legacy incumbent LEC of its existing regulatory obligations. See, e.g., Iowa Telecom Comments at 11-14; Qwest Comments at 2, 11, 13-15; Iowa Telecom Reply at 1-2, 4-7; Qwest Reply at 6-7; but see GCI Comments at 14 (arguing that a legacy incumbent LEC should not automatically be reclassified as a competitive LEC after a section 251(h)(2) finding).

<sup>67</sup> See *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), vacated sub nom., *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, *MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), vacated sub nom., *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the *Competitive Carrier Proceeding*); see also, e.g., ACS Comments at 5 (arguing that the competitive LEC/incumbent LEC classification should be considered separate from the dominant/non-dominant classification issues).

<sup>68</sup> 47 U.S.C. § 160. See, e.g., *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005), appeal pending, *Qwest Corporation v. FCC*, No. 05-1450 (D.C. Cir. filed Dec. 12, 2005) (*Qwest Omaha Order*) (Commission forbore from applying certain dominant carrier regulation and unbundling requirements to Qwest in all or parts of the Omaha Metropolitan Statistical Area).

<sup>69</sup> Compare 47 U.S.C. § 251(h)(2), with 47 U.S.C. § 160. There is no indication in the statute that designating a LEC as an incumbent LEC for purposes of section 251 was intended to lift section 251(c) obligations from the legacy incumbent LEC automatically without adhering to the mechanisms provided in the Act for removal of unnecessary regulation. Accordingly, we do not accept the suggestion of some commenters that the requirements of section 10 for removal of section 251(c) obligations are automatically met if the elements of section 251(h)(2) are satisfied. The statutory language does not support the commenters' argument in this regard and they do not cite any legislative history that would persuade us that their theory is consistent with the Congressional intent.

<sup>70</sup> Qwest Comments at 11-15; see also Qwest Reply at 6-8; Qwest Aug. 24, 2006 *Ex Parte* Letter at 3.

<sup>71</sup> The Commission only considers requests for forbearance pursuant to section 10 if they meet certain procedural requirements. See 47 C.F.R. § 1.53 (stating that any forbearance request must be filed as a separate pleading and identified as such in the caption). Qwest did not file a separate forbearance request consistent with our rules, and as such did not satisfy the Commission's procedural requirements.

Commission did not specifically request comment on whether the standards for forbearance are satisfied in the present circumstances.<sup>72</sup> We can, however, address dominant carrier regulation of Qwest in the Terry exchange under other relevant precedent and do so below.

### 1. The Competitive Carrier Proceeding

25. In the *Competitive Carrier Proceeding*, the Commission distinguished between carriers with market power (*i.e.*, dominant carriers) and those that lacked market power in their respective communications markets (*i.e.*, non-dominant carriers).<sup>73</sup> The Commission found that non-dominant carriers did not require the same regulatory treatment as dominant carriers and thus relaxed its regulations for non-dominant carriers. Specifically, dominant carriers are subject to price cap or rate-of-return regulation, and must file tariffs and cost support for some services on a minimum of seven or fifteen days' notice.<sup>74</sup> The Commission found that direct rate regulation was generally not necessary for non-dominant carriers, and allowed them to file tariffs on one day's notice without cost support.<sup>75</sup> Moreover, filings by non-dominant carriers are presumed lawful if they become effective without suspension.<sup>76</sup> Additionally, non-dominant carriers are required to wait only 30 days before their applications to discontinue, reduce, or impair service can be granted, as opposed to a 60-day waiting period for dominant carriers.<sup>77</sup> Finally, non-dominant carriers are accorded presumptive streamlined treatment under section 214 of the Act for certain types of transfers of control for which dominant carriers must follow more rigorous procedures.<sup>78</sup>

26. In the *Competitive Carrier First Report and Order*, the Commission began establishing a framework for defining a dominant carrier. In determining market power, the Commission focused on "clearly identifiable market features," including "the number and size distribution of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services," and whether the firm controlled "bottleneck facilities."<sup>79</sup> In the *Competitive Carrier Fourth Report and Order*, the Commission further elaborated on its definition of market power by citing the definitions of Areeda and

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<sup>72</sup> See Notice, 19 FCC Rcd at 23078, para. 15 (seeking comment on whether section 10 is the required mechanism for addressing future regulation of a legacy incumbent LEC and the relationship between the findings under section 251(h)(2) and a section 10 analysis).

<sup>73</sup> See *Competitive Carrier Proceeding* *supra* note 67. The Commission has also defined dominant carrier in section 61.3 of the Commission's rules. 47 C.F.R. § 61.3(q) ("Dominant carrier" is defined as a "carrier found by the Commission to have market power (*i.e.*, power to control prices).").

<sup>74</sup> Fifteen days' notice is required for rate increases and changes to terms and conditions and seven days' notice is required for rate decreases. See 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58.

<sup>75</sup> 47 C.F.R. § 61.23(c); *Tariff Filing Requirements for Non-Dominant Carriers*, Order, 10 FCC Rcd 13653, 13654, paras. 4-5 (1995).

<sup>76</sup> 47 C.F.R. § 1.773(a)(ii).

<sup>77</sup> 47 C.F.R. § 63.71(c).

<sup>78</sup> 47 C.F.R. § 63.03(b).

<sup>79</sup> *Competitive Carrier First Report and Order*, 85 FCC 2d at 21, paras. 57-58.

Turner, and of Landes and Posner.<sup>80</sup> Areeda and Turner defined market power as “the ability to raise prices by restricting output,” and Landes and Posner defined it as “the ability to raise and maintain prices above the competitive level without driving away so many customers as to make the increase unprofitable.”<sup>81</sup>

27. In the *AT&T Reclassification Order*, the Commission applied a framework for assessing market power based on four tests derived from well-accepted antitrust principles. Based on this analysis, the Commission reclassified AT&T as non-dominant in the interstate, domestic, interexchange market.<sup>82</sup> These tests included: (1) market share; (2) the supply elasticity of the market; (3) the demand elasticity of customers; and (4) the cost structure, size, and resources of the company involved.<sup>83</sup> The Commission concluded that a market share analysis could not be the sole factor in determining whether a carrier possessed market power and thus the three other analyses also must be examined.<sup>84</sup>

28. For supply elasticity, the Commission examined two factors: the supply capacity of existing competitors and the extent of entry barriers.<sup>85</sup> Specifically, this analysis focused on whether AT&T’s existing competitors had or could easily acquire significant additional capacity in a short time period and, if existing competitors lacked excess capacity, could new competitors enter the market easily and add to existing capacity.<sup>86</sup> The demand elasticity analysis focused on whether a carrier had the ability to raise its prices unilaterally above its competitors without losing customers.<sup>87</sup> Finally, the Commission examined AT&T’s cost structure, size, and resources to determine whether AT&T had the ability to prevent competition.<sup>88</sup>

## 2. Treatment of Qwest as a Non-Dominant Carrier

29. We find that Qwest lacks market power in the Terry exchange and should be treated as a non-dominant carrier for its interstate telecommunications services in that exchange. In reclassifying Qwest as a non-dominant carrier for these services, we assess whether Qwest possesses market power utilizing the Commission’s analytical framework in the *AT&T Reclassification Order* described above. In particular, we consider the following four factors: (1) market share; (2) supply elasticity; (3) demand

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<sup>80</sup> See *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 558, paras. 7-8.

<sup>81</sup> *Id.*

<sup>82</sup> See *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3293-94, para. 38-39 (1995) (*AT&T Reclassification Order*).

<sup>83</sup> See *id.* at 3293, para. 38.

<sup>84</sup> See *id.* at 3307, para. 68.

<sup>85</sup> See *id.* at 3303, para. 57.

<sup>86</sup> See *id.*

<sup>87</sup> See *id.* at 3305-06, paras. 63-64.

<sup>88</sup> See *id.* at 3309, para. 73.

elasticity; and (4) Qwest's cost structure, size, and resources.<sup>89</sup>

30. Market Share. The evidence demonstrates that Qwest does not have a substantial market share in the Terry exchange. Although there are differing estimates in the record, Mid-Rivers serves between 85 and 93 percent of the access lines in the Terry exchange.<sup>90</sup> Thus, Qwest serves only between 7 and 15 percent of the access lines in the Terry exchange. For a legacy incumbent LEC with facilities throughout the exchange, this is a very small market share.

31. Supply Elasticity. In analyzing the supply elasticity in the Terry exchange, we find that supply is sufficiently elastic to constrain Qwest from unilateral pricing decisions. In making this determination, we focus on the fact that Mid-Rivers has constructed new, technologically advanced facilities in most of the Terry exchange.<sup>91</sup> Thus, Mid-Rivers has enough readily available capacity on its network to constrain Qwest's pricing behavior in the Terry exchange.

32. Demand Elasticity. We additionally find that the Terry exchange customers are highly demand elastic and have shown a willingness to switch service providers in order to obtain price reductions or better quality of service. Specifically, Mid-Rivers estimates that within a year of its entry into Terry, approximately 90 percent of Qwest's subscribers converted to Mid-Rivers' service.<sup>92</sup> We note that Mid-Rivers provides additional services, beyond basic telephone service, including DSL, Internet, ITV to the local school, and CLASS, which likely have an effect on customer choice.<sup>93</sup> Mid-Rivers has also demonstrated a strong commitment to maintenance and repair service in the Terry exchange, which could affect subscribership.<sup>94</sup>

33. Qwest's Cost Structure, Size, and Resources. Despite Qwest's overall size and resources, we do not find that such advantages, by themselves, confer market power on Qwest. Moreover, as previously noted, Mid-Rivers has constructed a more modern and efficient competing network than Qwest's in the Terry exchange. Thus, we find that Qwest's size, overall cost structure, and resources do not constitute evidence of market power in the Terry exchange under the present circumstances such as to "preclude the effective functioning of a competitive market."<sup>95</sup>

34. Based on our review of the criteria above, we conclude that Qwest clearly qualifies for non-dominant carrier treatment in the Terry exchange.<sup>96</sup> If Qwest chooses, however, it may continue to

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<sup>89</sup> See *id.* at 3293, para. 38.

<sup>90</sup> See *supra* note 33; Mid-Rivers Petition at 2 n.2; see also, e.g., ACS Comments at 2 (arguing that any carrier that falls below a 50 percent market share should be relieved of dominant carrier regulation).

<sup>91</sup> Mid-Rivers Petition at 1-2; Mid-Rivers July 25, 2006 *Ex Parte* Letter (updating the record to reflect that Mid-Rivers, since filing its Petition, has completed overbuilding the Terry exchange).

<sup>92</sup> *Id.* at 2.

<sup>93</sup> *Id.* at 3.

<sup>94</sup> See *supra* note 37.

<sup>95</sup> *AT&T Reclassification Order*, 11 FCC Rcd at 3309, para. 73.

<sup>96</sup> This means that Qwest's interstate services are not subject to price cap or rate-of-return regulation, Qwest may file tariffs on one day's notice without cost support, Qwest is only required to wait 30 days before its applications to (continued....)

operate pursuant to dominant carrier regulation since this might be more convenient for administrative purposes given the very small number of lines involved. The Commission will consider removal of additional regulatory obligations<sup>97</sup> in the Terry exchange if Qwest files a formal petition requesting such relief.<sup>98</sup> This classification of Qwest in the Terry exchange only applies to the regulation of interstate services, and the Montana Commission retains the authority to regulate Qwest's intrastate services in the Terry exchange consistent with state requirements.

### 3. Subsequent Regulation of Mid-Rivers

35. We do not address in this Order the appropriate long-term regulatory treatment of Mid-Rivers in the Terry exchange. Thus, Mid-Rivers will remain subject to existing competitive LEC non-dominant regulation for its interstate telecommunications services pending further Commission action.<sup>99</sup> Mid-Rivers has stated that it plans to file a study area boundary waiver request to allow it to incorporate its Terry operations into its existing study area, which operates under dominant carrier regulation.<sup>100</sup> Mid-Rivers has also stated that it wishes to include the Terry lines in the NECA pool.<sup>101</sup> Under these circumstances, Mid-Rivers may wish to have its Terry operations subject to dominant carrier regulation. Therefore, the Commission will address Mid-Rivers' regulatory classification in

(Continued from previous page) \_\_\_\_\_

discontinue, reduce, or impair service can be granted, and Qwest will be accorded presumptive streamlined treatment for transfers of control in the Terry exchange. *See supra* para. 25. If Qwest operates under non-dominant carrier regulation in the Terry exchange, to preserve the status quo pending further agency action, we cap Qwest's carrier-to-carrier interstate switched exchange access rates in the Terry exchange at their level on the date we adopt this Order. Qwest may, however, lower these rates subject to compliance with non-dominant carrier regulatory requirements. *See generally Qwest Omaha Order*, 20 FCC Rcd at 19435, paras. 40-41.

<sup>97</sup> Additional obligations applicable to Qwest in the Terry exchange include, for example, section 251(c) unbundling and resale obligations and section 271 unbundling requirements.

<sup>98</sup> *See, e.g.*, GCI Comments at 14 (stating that Qwest should have to file a forbearance application before it has the option of becoming a competitive LEC); Montana Commission Comments at 8-9 (arguing that Qwest should retain its incumbent LEC status and remain subject to unbundling obligations); RICA Comments at 7 (stating that nothing in the Act precludes two incumbent LECs in the same area and in the absence of a request from Qwest to change its status pursuant to a forbearance petition, the Commission should not act); Staurulakis Comments at 2 (stating that until Qwest seeks to relinquish its incumbent LEC status it should remain one); AT&T Reply at 4-6 (arguing that Qwest should remain subject to all applicable incumbent LEC obligations until the Commission approves a forbearance petition); GCI Reply at 6-7 (arguing that the Commission should not forbear from an incumbent LEC's section 251(c) duties absent a section 10 showing); *but see* TCA Comments at 6 (seeing no reason for two incumbent LECs in the same area); Qwest Reply at 5-6 (arguing that Qwest should not remain an incumbent LEC in the Terry exchange); SBC Reply at 1 (arguing that the Commission should not continue imposing section 251(c) obligations on the legacy incumbent in this context); SBC Reply at 2-3 (contending that the Act does not contemplate imposing incumbent LEC status on more than one carrier in an area). Although we only address dominant carrier regulation in this Order, we explicitly state that this Order does not prejudice a future Qwest request for forbearance from additional regulation.

<sup>99</sup> This would include the interstate switched exchange access benchmark, among other requirements, pending further action. *See* 47 C.F.R. § 61.26.

<sup>100</sup> *See* Mid-Rivers Petition at 3; *Notice*, 19 FCC Rcd at 23078, para. 14 n.50; Mid-Rivers July 25, 2006 *Ex Parte* Letter.

<sup>101</sup> *See* Mid-Rivers Petition at 3.



conjunction with the Mid-Rivers' study area boundary waiver request once that request is filed. Commission action on the study area boundary waiver request could also be accompanied by further changes in the regulatory status of Qwest's operations in the Terry exchange.

#### IV. PROCEDURAL MATTERS

##### A. Paperwork Reduction Act

36. This document does not contain new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

##### B. Final Regulatory Flexibility Analysis

37. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>102</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Mid-Rivers Notice of Proposed Rulemaking*.<sup>103</sup> We received no comments regarding the IRFA.

38. In conformance with the RFA,<sup>104</sup> we certify that the rules adopted herein will not have a significant economic impact on a substantial number of small entities. Our rule treating Mid-Rivers as an incumbent LEC pursuant to section 251(h)(2) will affect only Mid-Rivers directly. Even if Mid-Rivers can be classified as a small entity, it does not constitute a "substantial number of small entities" for purposes of the RFA. In addition, we accord non-dominant carrier status to Qwest's interstate telecommunications operations in the Terry exchange and cap Qwest's carrier-to-carrier switched access rates in the Terry exchange at their levels as of the date of adoption of this Order. We note that Qwest is not a small entity.<sup>105</sup>

39. The Commission will send a copy of the Report and Order, including the foregoing certification, in a report to Congress and the Comptroller General pursuant to the Congressional Review Act.<sup>106</sup> In addition, the Commission will send a copy of the Report and Order, including this certification to the Chief Counsel for Advocacy of the SBA, and will also publish it in the Federal Register.<sup>107</sup>

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<sup>102</sup> *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>103</sup> *Notice*, 19 FCC Rcd at 23081-91, paras. 26-50.

<sup>104</sup> We have treated this as a rulemaking under the RFA. *See supra* note 12. RFA analysis applies to certain categories of rules of particular applicability. 5 U.S.C. § 601(2).

<sup>105</sup> In addition, it appears that our actions with regard to Qwest fall outside the scope of the RFA because they are rules of particular applicability involving rates and pricing. *See generally* 5 U.S.C. § 601(2).

<sup>106</sup> *See* 5 U.S.C. § 801(a)(1)(A).

<sup>107</sup> *See* 5 U.S.C. § 605(b).

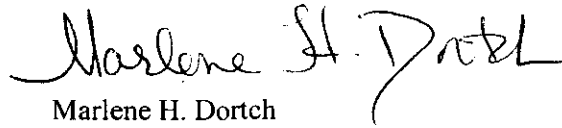
**V. ORDERING CLAUSES**

40. Accordingly, IT IS ORDERED, pursuant to section 251(h)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 251(h)(2), and section 51.223 of the Commission's rules, 47 C.F.R. § 51.223, that Mid-Rivers Telephone Cooperative, Inc. will be treated as an incumbent local exchange carrier for purposes of section 251 in the Terry, Montana exchange, as described herein.

41. IT IS FURTHER ORDERED that Qwest is relieved of its dominant carrier status for its interstate telecommunications services in the Terry exchange as described herein.

42. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in dark ink, appearing to read "Marlene H. Dortch", is written over the printed name and title.

Marlene H. Dortch  
Secretary

**APPENDIX A  
LIST OF COMMENTERS TO THE PUBLIC NOTICE**

**Comments Filed in Response to the Public Notice in WC Docket No. 02-78**

<b><u>Comments</u></b>	<b><u>Abbreviation</u></b>
John Staurulakis, Inc.	Staurulakis
National Telecommunications Cooperative Association	NTCA
Rural Independent Competitive Alliance	RICA

**Opposition Filed in Response to the Public Notice in WC Docket No. 02-78**

<b><u>Opposition</u></b>	<b><u>Abbreviation</u></b>
Western Wireless Corporation	Western Wireless

**APPENDIX B**  
**LIST OF COMMENTERS TO THE NOTICE**

**Comments Filed in Response to the Notice in WC Docket No. 02-78**

<b><u>Comments</u></b>	<b><u>Abbreviation</u></b>
ACS of Anchorage, Inc., ACS of Alaska, Inc., and ACS of Fairbanks, Inc.	ACS
AT&T Corp. (filed prior to merger with SBC)	AT&T
General Communications, Inc.	GCI
Hancock Communications, Inc.	Hancock
Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom	Iowa Telecom
John Staurulakis, Inc.	Staurulakis
Montana Public Service Commission	Montana Commission
National Telecommunications Cooperative Association	NTCA
Prairie County, Montana	Prairie County
Qwest Communications International Inc.	Qwest
Rural Independent Competitive Alliance	RICA
SBC Communications Inc. (filed prior to merger with AT&T)	SBC
Sprint Corporation	Sprint
TCA, Inc. - Telcom Consulting Associates	TCA

**Reply Comments Filed in Response to the Notice in WC Docket No. 02-78**

<b><u>Reply Comments</u></b>	<b><u>Abbreviation</u></b>
AT&T Corp.	AT&T
Cox Communications, Inc.	Cox
General Communications, Inc.	GCI
Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom	Iowa Telecom
Mid-Rivers Telephone Cooperative, Inc.	Mid-Rivers
Montana Public Service Commission	Montana Commission
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Qwest Communications International Inc.	Qwest
SBC Communications Inc.	SBC
South Slope Cooperative Telephone Company, Inc.	South Slope
Verizon telephone companies	Verizon